FRANCISZEK LONGCHAMPS DE BÉRIER

LAW AND FINANCE: UNDERSTANDING ROMAN LAW?

A. THE THEORY

Recently, Roman law has once again become central to the discussion on comparative law and, even more interestingly, it also has a central role to play in the debate on the perspectives of economic growth. It has attracted particular attention in the literature on modern economics and finance, especially in the years 1997–2008 as a result of the economic research carried out by a number of distinguished scholars from Harvard University: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and professor Robert W. Vishny from the University of Chicago.[1] Their research focused on issues of investor protection and corporate governance across the world. They reviewed cross-country differences in laws and practices pertaining to these issues and how the differences cause economies, stock markets, and firms' financing practices to vary. This area of studies is known as *law and finance*, and the authors of the research called their results *legal origins theory*. As Ulrike Malmendier pointed out, "the law and finance literature suggests a causal impact of countries' legal systems. Another strand of the literature emphasizes the role of the political environment and argues that the effectiveness of institutions varies considerably with the political support they receive."[2] It not only concentrates on future progress, but emphasizes continuity with the past, studies legal traditions and tends

[1] R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R.W. Vishny, The Legal Determinants of External Finance, Journal of Finance 1997, vol. 53, No. 3, p. 1131–1150; R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R.W. Vishny, Law and Finance, Journal of Political Economy 1998, vol. 106, No. 6, p. 1113–1155; R. La Porta, F. Lopez-de-Silanes, A. Shleifer, The Economic Consequences of Legal Origins, Journal of Economic Literature 2008, vol. 46, No. 2, p. 285–332.

[2] U. Malmendier, Law and Finance *at the Origin*, Journal of Economic Literature 2009, vol. 47, No. 4, p. 1076.

to evaluate their usefulness for financial and commercial development in the contemporary globalizing world.

The legal origins theory blames Roman law for creating worse opportunities for economic growth than common law systems. According to American researchers, Roman law impedes the financial development of countries whose legal system remains within the civil law tradition. They describe civil law – in contrast to common law – as legal systems in which the country's company law or commercial code originates in Roman law. "Economists who investigate the determinants of financial development and economic growth across countries have long debated the importance of the institutional environment, including a country's legal system. Only more recently, however, they have started distinguishing between civil-law systems with *Roman legal origin* and common-law systems. Legal origin is used as an econometric instrument, i.e., an empirical technique to causally identify how amenable different legal systems are to economic growth and financial development. The main result is that countries with Roman legal origin have been found to have less developed financial markets."[3] It should, however, be noticed that law and finance tends to be cautious about making direct accusations against Roman law, referring to the *Roman law tradition* or *civil law (originating in Roman law)*[4] *rather than to Roman law itself. "The characterization of Roman legal origin countries as rigid* and unwelcoming towards economic growth"[5] seems typical of the literature approving the legal origins theory. This is because the flexibility of the *law as practised* is considered to be stimulating for economic growth. Law and finance considers "*Roman legal origin* as an econometric instrument to measure the causal impact of law on growth."[6] Therefore it is essential to note that "the finance and law theory claims to present two empirical findings in its support; (1) that the legal origin predicts the level of investor protection, and (2) that the legal origin helps [to explain] the level or quality of financial development."[7]

Law and finance concentrates its blueprint for policy reform on the fact that "some countries offer much stronger legal protection of

[3] U. Malmendier, Roman Law and Law-and-Finance Debate, in: H. Altmeppen, I. Reichard, and M. Schermaier (eds.), Festschrift für Rolf Knütel, Heidelberg 2009, p. 719.

[4] La Porta 2008 (N. 1), p. 286.

[5] Malmendier (N. 3), p. 719.

[6] Ibid., p. 720.

[7] M. Graff, Myths and Truths: The "Law and Finance Theory" Revisited, Jahrbuch für Wirtschaftswissenschaften, Review of Economics 2006, vol. 57, No. 1, p. 63.

outside investors' interests than others."[8] They emphasize that "legal rules protecting investors vary systematically among legal traditions or origins, with the laws of common law countries (originating in English law) being more protective of outside investors than the laws of civil law (originating in Roman law) and particularly French civil law countries."[9] This is because, for the sake of analysis, Rafael La Porta and others have distinguished four legal traditions: British common law, French civil law, German civil law and Scandinavian civil law. They have attempted to show empirically that common law leads to better economic outcomes than civil law. They have found common law systems to be the best, e.g. for facilitating debt financing, while French civil law scores the worst. Generally speaking, the French system always seems to be the least advantageous for economic growth and financial development.

The most fragile point in the theory is that the French system, considered to be a civil law system, is identified as being the one that is most Roman in origin. This is flawed from the point of view of both legal history and comparative legal studies. The researchers were aware that "the civil law tradition is the oldest, the most influential, and the most widely distributed around the world, especially after so many transition economies have returned to it. It originates in Roman law, uses statutes and comprehensive codes as a primary means of ordering legal material, and relies heavily on legal scholars to ascertain and formulate rules.[10] Dispute resolution tends to be inquisitorial rather than adversarial. Roman law was rediscovered in the Middle Ages in Italy, adopted by the Catholic Church for its purposes, and from there formed the basis of secular laws in many European countries."[11] As the authors of the legal origins theory said: "we adopt a broad conception of legal origin as a style of social control of economic life (and maybe of other aspects of life as well). In strong form (later to be supplemented by a variety of caveats), we argue that common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations. In the words of one legal scholar, civil law is *policy implementing*, while common law is *dispute resolving*."[12] The authors of the legal origins

[8] La Porta 2008 (N. 1), p. 285.

[9] Ibid., p. 285–286.

[10] Citing J.H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, Stanford 1969, p. 6–11.

[11] La Porta 2008 (N. 1), p. 289.

[12] Ibid., p. 286.

theory are explicit in their analysis, as they state that in their conception, "legal origins are central to understanding the varieties of capitalism."[13] Criticizing their law and finance analysis has helped researchers to establish that the "legal origins theory has three basic ingredients. First, regardless of whether the medieval or revolutionary narrative is the correct one, by the eighteenth or nineteenth centuries England and Continental Europe, particularly France, had developed very different styles of social control of business, and institutions supporting these styles. Second, these styles of social control, as well as legal institutions supporting them, were transplanted by the origin countries to most of the world, rather than written from scratch. Third, although a great deal of legal and regulatory change has occurred, these styles have proved persistent in addressing social problems."[14]

It is pleasing to learn that Roman law is at the centre of economists' interests. The main question, however, is what they consider to be Roman law. Their understanding of the civil law tradition has a significant influence on the evaluation of their critique of the presence of Roman law in contemporary jurisprudential debates. It is worth remembering that in the 1950s, a prominent professor from Rome, Riccardo Orestano, defined six meanings of Roman law, the last of them being described by the neologism *romanesimo*. This notion of Roman law "does not correspond to any historic formation, but it is a hypostasis of idealistic and heterogeneous aspirations, i.e. an entirely subjective concept of Roman law. Considered in an abstract way, Roman law is the result of the aspirations and their eponym."[15] Roman law understood as *romanesimo* is used as a part of the apologies for or arguments based on the evaluation of Roman law. However this evaluation has no research basis. These aspirations are of a political or sentimental nature; they change in different epochs based on the evolution of the current and leading approaches in a particular period. This is the meaning of *Roman law* as used, for example, by the Polish nobility in the 16th, 17th and 18th centuries. They identified Roman law with a despotic emperor and considered it a legal system of dictatorship and absolutism, believing the democracy of nobles would be threatened if based on the Roman

[13] Ibid., p. 287.

[14] Ibid., p. 306–307.

[15] R. Orestano, Diritto romano (Roman Law), in: Novissimo Digesto Italiano, 5, UTET, Torino 1953, p. 1025; R. Orestano, Introduzione allo studio storico del diritto romano (An Introduction to the Historic Research in Roman Law), 2nd ed., Torino 1961, p. 511–512.

law tradition. The tradition only came to Poland with the partitions, when Poland ceased to exist as an independent state in 1795, and with the French, Austrian and German codes respectively that were subsequently introduced and came into force. But Roman law was used as *romanesimo* also in point 19 of Hitler's NSDAP program which stated: "We demand that Roman Law, which serves a materialist world order, be replaced by German common law."[16]

Promoters of the legal originstheory are aware that not only they lean on the differences between common and civil law. They acknowledged that Friedrich August von Hayek "traces the differences between common and civil law to distinct conceptions of freedom. He distinguishes two views of freedom directly traceable to the predominance of an essentially empiricist view of the world in England and a rationalist approach in France". They cited Hayek's very words: "One finds the essence of freedom in spontaneity and the absence of coercion, the other believes it to be realized only in the pursuit and attainment of an absolute social purpose; one stands for organic, slow, self-conscious growth, the other for doctrinaire deliberateness; one for trial and error procedure, the other for the enforced solely valid pattern."[17] But, as they noticed, "[t]o Hayek, the differences in legal systems reflect these profound differences in philosophies of freedom."[18] To them the differences explain the variances in economic growth and are essential for suggesting legal reforms and unblocking avenues of progress.

B. THE CRITIQUE OF THE THEORY

The authors of the legal origins theory seem to be proud of the criticism they receive from various sources. In 2008, they decided to react to three lines of criticism of their research, all organized around the idea that legal origin is a proxy for something else. The three alternatives they considered in the response to their critics were culture, politics, and history.[19]

[16] Cfr., e.g. L. Preuss, Germanic Law versus Roman Law in National Socialist Legal Theory, Journal of Comparative Legislation and International Law, Third Series 1934, vol. 16, No. 4, p. 269–280; M. Stolleis, The Law under the Swastika. Studies on Legal History in Nazi Germany, Chicago–London 1998, p. 21 ff.

[17] F.A. Hayek, The Constitution of Liberty, Chicago 1960, p. 56.

[18] La Porta 2008 (N. 1), p. 303.

[19] Ibid., p. 287.

An approach based along the lines of culture suggests that, in the light of the hostility of some religious traditions to lending with interest, religion may be a more fundamental determinant of legal rules governing creditor protection than legal tradition.[20] A more sweeping case is presented using psychological measures of cultural attitudes to predict legal rules.[21] The main question is whether legal origins are merely proxies for cultural variables. The founders of the legal origins theory seem untouched by such doubts. They are convinced that cultural variables do not make much of a dent in the explanatory power of legal origins, although they do note that the notions of culture they consider focus on religion and broad social attitudes.[22]

A more important challenge to the explanatory power of legal origins has been posed by the political theories of corporate finance.[23] The founders admitted that after extended research they had decided to specify their own position in a longer discourse. "According to the political theories, sometime in the middle of the 20th century, Continental European countries formed alliances between families that controlled firms and (typically organized) labour. In many cases, these alliances were a response to crises from hyperinflation, depression, or defeat in war. These political alliances sought to win elections in order to secure the economic rents of insiders, and to keep them from *outsiders*, such as unorganized labour, minority shareholders, corporate challengers, or potential entrants. When these alliances won elections, they wrote legal rules to benefit themselves. The families secured the poor protection of outside shareholders, so they could hold on to the private benefits of control. Labour got social security and worker protection laws, which maintained the employment and wages of the insiders. Both the families and labour secured laws protecting them against product market competition, such as regulation of entry. The legal rules observed in

[20] R.M. Stulz, and R. Williamson, Culture, Openness and Finance, Journal of Financial Economics 2003, vol. 70, No. 2, p. 313–349.

[21] A.N. Licht, C. Goldschmidt, and S.H. Schwartz, Culture, Law, and Corporate Governance, International Review of Law and Economics 2005, vol. 25, No. 2, p. 229–255.

[22] La Porta 2008 (N. 1), p. 311.

[23] Cfr., e.g. R.G. Rajan, and L. Zingales, The Great Reversals: the Politics of Financial Development in the Twentieth Century, Journal of Financial Economics 2003, vol. 69, No. 1, p. 5–50; M. Pagano, and P.F. Volpin, The Political Economy of Corporate Governance, American Economic Review 2005, vol. 95, No. 4, p. 1005–1030; M.J. Roe, Legal Origins, Politics, and Modern Stock Markets, Harvard Law Review 2006, vol. 120, No. 2, p. 460–527; S. Haber, and E.C. Perotti, The Political Economy of Finance, 2008, http://fic.wharton.upenn.edu/fic/sicily/19%20haberperotti.pdf (29/04/2013).

the data, then, are outcomes of this democratic process and not of any *permanent* conditions, such as legal origins."[24]

Then comes the critique of the Roman law specialist Ulrike Malmendier, professor of economics at the University of California. In Europe, she published a renowned book on the *societas publicanorum*[25], which became the starting point for her remarks that politics often had a prevailing influence on paths of economic development. This seems to be proved by the example of the societas publicanorum. As a business corporation, the *societas publicanorum* differed from the Roman partnership (*societas*) and also differed in many ways from a modern corporation in that the partners (*socii*) could not limit their liability. But the publicans (*publicani*), although private contractors, were not called *government leaseholders* without reason. This was because of the four features which differentiated the *societas publicanorum* from the simple *societas*, these being representation, continuity and stability, external financing, rights and obligations. An individual could contractually bind the firm and assume rights in the name of the firm; the representative could interact with the censor, i.e. with the public authority, and could bid for contracts at a public auction. The firm did not cease to exist if a partner died or left the firm; legal disputes among the partners did not necessarily affect the existence of the firm, as they did in the case of a typical Roman partnership. Investors could provide capital and acquire shares without becoming partners and without being liable for the company's obligations; the shares were traded and had fluctuating prices. A partnership of tax collectors could file actions; the firm could own property and inherit items. Therefore the *societas publicanorum* had assumed important features of a modern corporation. No wonder it was described as a separate legal entity.[26]

The entire analysis of this very specific example of special partnership focuses on the question: why did the publicans disappear? In her answer, Malmendier emphasizes political rather than legal reasons as being the main determinants of financial development and economic growth. "In my analysis of the *societas publicanorum*, the flexibility of Rome's legal system emerges as one important factor in the development of advanced financial contracting arrangements. A second major influence

[24] La Porta 2008 (N. 1), p. 311.

[25] U. Malmendier, *Societas publicanorum.* Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer, Köln–Weimar–Wien 2002.

[26] Malmendier (N. 2), p. 14–15.

was the interests of the political elites during the Roman Republic and Empire. Much of the current literature revolves exactly around these two determinants: law and politics."[27] She has no doubt that "the evolution of Roman law during the Roman Republic and then the Roman Empire illustrate (...) that legal restrictions *per se* may matter little for economic growth as long as the law as practised is flexible."[28] Ulrike Malmendier recalls two other important examples which illustrate flexibility as being a typical feature of Roman law. These are the answers to two problems: Roman law knew neither limited liability nor agency law. That fact did not impede the economic growth and development of the market because the Romans found their own ways of coping with the problem. In the first instance, the Romans employed *company slaves* as managers and provided them with a *peculium* for business transactions. In the second instance, they had the power of a Roman father (*pater familias*) over his (adult) children (*patria potestas*) as well as the ownership of his slaves thus creating a natural way of providing a form of agency.[29] She is, therefore, in favour of the politics-and-finance rather than law-and-finance approach. "Legal traditions do not suffice to explain the difference in financial development *between* civil-law and common-law countries and its variation *within* countries over time, and *politics* or *political economy* in the spirit of North[30], appear to be the missing ingredient."[31] Political circumstances proved more important throughout centuries of European legal history.

The approach based on the historical line of critique proved to be particularly convincing. Simplicity might be refreshing and instructive, but oversimplification always blurs the description of the basis for further research and causes the instability of everything built on it. A clear example is given by the legal origins theory. "The law-and-finance literature interprets the divide between common law countries and civil-law countries as one between countries with flexible and adaptable case law versus countries with rigid codified law. This categorization misses the fact that, as far as *origins* are concerned, Roman law is fundamentally case law."[32] Legal language and legal knowledge differ but not so much the social problems they have to deal with, or the ways of legal interpretation, i.e. in which direction a legal issue could

[27] Ibid., p. 23.
[28] Malmendier (N. 3), p. 720.
[29] Ibid., p. 727–728.
[30] D.C. North, Structure and Change in Economics History, New York 1981.
[31] Malmendier (N. 3), p. 730.
[32] Ibid., p. 726.

be interpreted. The founders of the law and finance analysis humbly admitted that "perhaps the most difficult challenge to the hypothesis that legal origins cause outcomes has been posed by historical arguments. (...) At the broadest level, historical arguments suggest that the positive correlation between common law and finance is a twentieth century phenomenon."[33]

Very strong criticism comes from comparative study, which continues the historic challenge of the law and finance approach. The inaccuracy of the four-part classification scheme of legal tradition, or better sub-traditions, is clear when reviewed in the light of various comparative law classifications proposed in the last century.[34]

The founders of the legal origins theory mentioned only three directions of the critique of their analysis: culture, politics, and history. But Michael Graff identified eight lines of criticism of the law and finance approach and grouped the relevant literature.[35] First, a frontal attack holds that the law and finance theory is a skilful piece of *pro markets* ideology, designed to deliver a rationale to the alleged superiority of the Anglo-Saxon model of corporate finance.[36] This does not seem sufficient to invalidate the legal origins theory and its findings. The second line opens to doubt the division into major legal families promoted by the law and finance theory. The theory points to a limited number of assignments of countries to a specific group.[37] A more challenging critique refers to the observation that the major legal systems were spread around the world together with the financial systems of the originating countries, so that the law and finance theory faces a fundamental identification problem. The alleged causal impact of the legal tradition cannot be separated from the coincidental transplantation of a wider range of institutions from England.[38] The fourth challenge tends to show that the

[33] La Porta 2008 (N. 1), p. 315.

[34] Cfr., e.g. Malmendier (N. 3), p. 721 ff.

[35] Graff (N. 7), p. 60–63.

[36] A. Singh, A. Singh, and B. Weisse, Corporate Governance, Competition, the New International Financial Architecture and Large Corporations in Emerging Markets, ESRC Centre for Business Research, University of Cambridge, Working Paper No. 250, 2002, http://www.cbr.cam.ac.uk/pdf/WP250.pdf (29/04/2013).

[37] D. Berkowitz, K. Pistor, and J.-F. Richard, Economic Development, Legality, and the Transplant Effect, Center for International Development at the Harvard University, CID Working Paper No. 39, 2000, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/publications/faculty/wp/039.pdf (29/04/2013).

[38] C.M. Fohlin, Economic, Political, and Legal Factors in Financial System Development: International Patterns in Historical Perspective, California Institute of Technology, Social Science Working Paper No. 1089, 2000, http://www.hss.caltech.edu/SSPapers/wp1089.pdf (29/04/2013).

law and finance founders' anti-director and creditor rights indices are better explained by a country's predominant religion rather than by its legal origin and conclude that the true causal chain runs from religion to investor protection.[39] The fifth line refers to cultural characteristics and submits the data discussed by law and finance to a secondary analysis. It finds that the cultural dimensions – measured by worldwide socio-psychological surveys – are at least as effective as the legal origin in explaining the inter-country variation in the legal characteristics of the financial system.[40] The sixth argument refers to environmental conditions that would either make overseas colonies attractive for European settlers or turn them into predominantly *extractive* colonies otherwise, which resulted in the comparatively lower institutional quality in the latter than in the former.[41] Therefore environment and climate can accordingly be regarded as alternatives to legal origin in predicting institutional quality. The seventh argument is in fact historic. It stresses that financial development has undergone major 'great reversals' and while common law countries nowadays tend to have more developed arm's length finance, at the beginning of the twentieth century, civil law countries were more advanced in this respect.[42] The eighth point indicates that the link between property rights and financial development can be addressed without imposing the legal origin paradigm that unifies the law and finance theory.[43] The lines of argumentation at least prove that the legal origins theory oversimplified the reality and possible impact of legal tradition in a country. "The theory faces an identification problem, since the majority of common law countries have a market-based financial system, whereas the majority of civil law

[39] Cfr. Stulz (N. 20).

[40] A.N. Licht, C. Goldschmidt, and S.H. Schwartz, Culture, Law, and Finance: Cultural Dimensions of Corporate Governance, SSRN Working Paper, 2001 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277613 (29/04/2013).

[41] D. Acemoglu, S. Johnson, and J.A. Robinson, The Colonial Origins of Comparative Development: An Empirical Investigation, American Economic Review 2001, vol. 91, No. 5, p. 1369–401; D. Acemoglu, S. Johnson, and J.A. Robinson, Reversal of Fortunes: Geography and Institutions in the Making of the Modern World Income Distribution, Quarterly Journal of Economics 2002, vol. 117, p. 1133–1192.

[42] Rajan (N. 23).

[43] Cfr., e.g. S. Knack, and P. Keefer, Institutions and Economic Performance: Cross country Tests Using Alternative Institutional Measures, Economics and Politics 1995, vol. 7, No. 3, p. 207–27; L. Grogan, and L. Moers, Growth Empirics with Institutional Measures for Transition Countries, Economic Systems 2001, vol. 25, No. 4, p. 323–334; S. Claessens, and L. Laeven, Financial Development, Property Rights and Growth, Journal of Finance 2003, vol. 58, No. 6, p. 2401–2436.

countries have a bank-based financial system."[44] Therefore the validity of founders' "anti-director rights and creditor rights indices for international comparisons of shareholder and creditor rights, the supremacy of the common law legacy in protecting investors and, consequently, the validity of legal origin variables to instrument for financial development, have to be regarded as myths rather than truths."[45]

C. ROMAN LEGAL EXPERIENCE

Roman law literature and the study of comparative law study entails a critique which blames law and finance for overestimating the division into civil law and common law. "[T]he distinction between legal systems with and without Roman origin – so-called civil-law and common-law countries – is less sharp than the law-and-finance literature suggests."[46] Researchers in Roman law had a similar experience: for years, research into Roman law promoted an opposition between *classical* and *Justinian* law, i.e. an opposition between so-called original Roman concepts and the Byzantine dogmatic mind and the simplified jurisprudence of sixth century compilers – strongly overstating the differences. In the law and finance analyses, the opposition is more between England and France, although insisting on that seems to take us to the Middle Ages, when England was very France-oriented. The civil law tradition is not simply French law. Nevertheless, it should be noted that the evolving legal origins theory is beginning to realize that: "A deeper understanding of the dynamics of legal traditions may also inform the crucial question of whether the differences between common and civil law will persist into the future"[47].

There are various ways in which Roman law and its inheritance manifests its presence in today's legal world; various emanations. But regardless of their present stage, Roman jurisprudence was flexibility and innovativeness. To understand the differences amongst the emanations, i.e. the plurality of legal solutions and regulations within the civil law tradition, one has to be aware of the origins. Simply referring to Roman law does not lead us very far. It is necessary to perceive

[44] Graff (N. 7), p. 74.
[45] Ibid.
[46] Malmendier (N. 3), p. 721.
[47] La Porta 2008 (N. 1), p. 327.

and understand the spirit of Roman law, which has nothing to do with an abstract idea of Roman law, it is about *Roman law in action*, – the Roman legal experience.

First, an ignorance of Roman law, i.e. of the spirit that formed Western civilization and European legal tradition, might be detrimental to those who trust the conclusions of any research like that of law and finance. Secondly, and more obviously, the more general a statement, the greater the margin of error created. Therefore the globalized blaming of Roman law or any legal tradition has to be considered risky from the very outset. Nevertheless, the founders of the law and finance analysis insisted that "being aware of all of that they did not change much the legal origins theory, although continuing the research they shaped it in more subtle way. Our interpretation of the meaning of legal origins has evolved considerably over time" and they decided to interpret legal origins broadly as highly persistent systems of social control over economic life[48]. "Subsequent research showed that the influence of legal origins on laws and regulations is not restricted to finance. In several studies (...), we found that such outcomes as government ownership of banks, the burden of entry regulations, regulation of labor markets, incidence of military conscription, and government ownership of the media vary across legal families. In all these spheres, civil law is associated with a heavier hand of government ownership and regulation than common law. Many of these indicators of government ownership and regulation are associated with adverse impacts on markets, such as greater corruption, larger unofficial economy, and higher unemployment. In still other studies, we have found that common law is associated with lower formalism of judicial procedures[49] and greater judicial independence[50] than civil law. These indicators are in turn associated with better contract enforcement and greater security of property rights"[51]. Nevertheless they concluded the article with an answer to the criticism by repeating: "our framework suggests that the common law approach to social control of economic life performs better than the civil law approach. When markets do or can work well, it is better to support than to replace them. As long as the world economy remains free of war, major financial

[48] Ibid., p. 326.

[49] S. Djankov, R. La Porta, F. Lopez-de-Silanes, and A. Shleifer, Courts, Quarterly Journal of Economics 2003, vol. 118, No. 2, p. 453–517.

[50] R. La Porta, F. Lopez-de-Silanes, C. Pop-Eleches, and A. Shleifer, Judicial Checks and Balances, Journal of Political Economy 2004, vol. 112, No. 2, p. 445–470.

[51] La Porta 2008 (N. 1), p. 286.

crises, or order extraordinary disturbances, the competitive pressures for market-supporting regulation will remain strong and we are likely to see continued liberalization. Of course, underlying this prediction is the hopeful assumption that nothing like World War II or the Great Depression will repeat itself. If it does, countries are likely to embrace civil law solutions, just as they did back then"[52]. They published this statement in 2008, i.e. at the outset of the global economic crisis.

To conclude, it is a positive factor when legal traditions are the object of particular interest among economists, also when they blame Roman law for its detrimental influence on financial markets because it confirms that the interest in Roman legal tradition has not been extinguished. The tradition is of importance not only to the European, but also the global civil law tradition originating in Roman law. The critique of the legal origins theory calls for experts in Roman law and thus there is a continuous need for an in-depth knowledge in Roman law: the teaching of it should be accessible to all and not only to lawyers. Access to a basic knowledge of Roman law should be created for others as well: economists, sociologists, historians, social philosophers and specialists in cultural studies. What is needed above all is good research into Roman law being conducted at numerous public and private institutions. It is not sufficient to have a limited group of experts, but to have independent centres for Roman legal studies. This is necessary not only to have straightforward information, but also to gain a deeper insight into our understanding of Roman law. Roman law is not only part of legal history, but is present in our legal systems due to their legal traditions – not only due to reception of law, but even independently: i.e. also due to its reasonableness and economic utility. The notions of reasonableness and economic utility belong to the very nature of law, and these concepts were perceived and understood well by the ancient Romans. Even when certain legal regulations were drafted in a country because of their reasonableness and economic utility – surprisingly or not – they correspond to, or resemble, what the Romans knew thousands of years ago. No doubt reasonableness and economic utility are typical features of Roman law and in order to see this we have to be aware of what the tradition is.

"The degree of interest *Roman legal origin* has attracted in the ongoing debate about institutional, including legal determinants of

[52] Ibid., p. 327.

financial development and growth"[53] is indeed surprising. But it is not only because of this theory that Roman law is present as an argument in contemporary legal debates. Therefore it has to be studied and researched, and the research has to be conducted constantly otherwise it only the phantom of Roman law will be present in the debates. The phantom would be the idea of *romanesimo*, rather than a real legal system useful for comparisons and inspiration.

Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia – "practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice"[54]. This observation by Ulpian, the distinguished 3rd century jurist in his work *Rules*, is rarely cited because it seems outdated. Legal science usually underestimates acquaintance with divine affairs. We think it is an outdated idea of legal experience. The idea originated in the legal practice of the highest-ranking priests from the College of Pontiffs. We presume that Ulpian was referring to the laicization of jurisprudence which has overtaken the role of the College of Pontiffs. Yet the divine is not only what is vertical, as in the understanding of St. Thomas Aquinas, as in the law of nature, but also horizontal: what is stable in law, i.e. what seems to belong to the nature of law. Both dimensions are essential for expertise in law. The debate on law and finance shows that it is quite instructive to study Roman law, a treasury of comparative and historical arguments in legal debates.

[53] Malmendier (N. 3), p. 736.
[54] D. 1,1,10,2. Ulpian book 1 *Regularum.*